

ARKANSAS SUPREME COURT

No. CR 07-1228

TERRY LYNN DAVIE
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered November 13, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF PULASKI COUNTY, CR
2004-1213, HON. CHRIS PIAZZA,
JUDGE

AFFIRMED.

PER CURIAM

In 2005, appellant Terry Lynn Davie was convicted by a jury of rape and sentenced to thirteen years' imprisonment. The Arkansas Court of Appeals affirmed. *Davie v. State*, CACR 06-64 (Ark. App. Feb. 7, 2007). Through counsel, appellant subsequently filed in the trial court a petition pursuant to Arkansas Rule of Criminal Procedure 37.1. The trial court denied the petition after a hearing, and appellant has lodged a pro se appeal here from the order.

We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

As the basis for postconviction relief, appellant claims that trial counsel rendered ineffective assistance. In support of this claim, he maintains that his criminal trial was conducted more than twelve months after his arrest which violated the speedy-trial rule set forth in Arkansas Rule of

Criminal Procedure 28.1. On this basis, he claims that the charges filed against him should have been dismissed. He asserts that, consequently, trial counsel was ineffective for failing to notice that appellant had been tried in violation of the speedy-trial rule and for failing to raise this issue prior to trial.¹

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsel's performance was deficient and, as a result, prejudiced the appellant to as to deprive him of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Noel v. State*, 342 Ark. 35, 26 S.W.3d 123 (2000). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). In this matter, determining that counsel was ineffective under *Strickland* is predicated upon whether appellant was in fact tried in violation of the speedy-trial rule. See *Camargo v. State*, 346 Ark. 118, 55 S.W.3d 255 (2001).

Under the speedy-trial rule, if a criminal defendant is not brought to trial within a certain time frame set out in the rule, the charges shall be dismissed with an absolute bar to prosecution. Ark. R. Crim. P. 28.1(c); Ark. R. Crim. P. 30.1. Criminal Procedure Rules 28.2 and 28.3 set out the calculation of time under the speedy-trial rule and authorize time periods to be excluded from calculation that result from necessary delays.

The record in this matter and in the direct appeal² reveals that appellant was arrested on

¹Appellant makes additional arguments for reversal to this court, but none was raised in the original petition. One such argument is that the trial court erred in allowing a certain time frame to be tolled for the purpose of calculating whether appellant had been given a speedy trial. Arguments raised for the first time on appeal will not be considered. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

²The record lodged in appellant's direct appeal is a public record which need not be incorporated into the record of a second appeal that stems from the same judgment of conviction. *Johnson v. State*,

January 29, 2004. The trial that was conducted on May 10, 2005, ended in a mistrial. After the mistrial, appellant was tried and convicted on October 5, 2005. For the purposes of determining time under Rule 28.1 in this matter, the speedy-trial clock commenced on the date of appellant's arrest and ended on the date of his first trial. Ark. R. Crim. P. 28.2(a). A second speedy-trial clock began to run on May 11, 2005, after the mistrial, and the clock stopped on October 5, 2005. Ark. R. Crim. P. 28.2(c); *Birmingham v. State*, 346 Ark. 78, 57 S.W.3d 118 (2001).

The initial speedy-trial time frame ran for 473 days.³ This time exceeded the one-year limitation in Rule 28.1(c) by 108 days. If trial counsel had moved for a dismissal below, he would have made a prima facie showing of a violation of the rule. At that point, the burden would have shifted to the State to show good cause for the delay. Ark. R. Crim. P. 28.3; *Dodson v. State*, 358 Ark. 372, 191 S.W.3d 511 (2004); *Chenoweth v. State*, 341 Ark. 722, 19 S.W.3d 612 (2000) (per curiam). If at least 108 days are properly excluded under Rule 28.3, then appellant would not have established that he was tried more than twelve months after his arrest. *Camargo, supra*.

Here, five consecutive continuances were granted prior to the first jury trial.⁴ Appellant argues that none of the continuances, covering August 19, 2004, until May 10, 2005, should be excluded from calculating the speedy-trial time. The linchpin of appellant's argument concerns the basis for the initial continuance.

At the August 19, 2004, hearing, the prosecutor sought a continuance because the Arkansas

332 Ark. 182, 964 S.W.2d 199 (1998) (per curiam).

³The post-mistrial time frame encompassed 141 days. There is no need to consider this time in light of the speedy-trial rule. Ark. R. Crim. P. 28.2(c). It is clear that appellant was tried the second time within the required twelve-month period under Rule 28.1 even if the entire time had been applied toward calculating the time limit under the rule.

⁴The hearings at which the trial court granted the motions to continue were held on August 19, 2004, October 19, 2004, December 16, 2004, February 10, 2005, and April 5, 2005.

State Crime Lab (“crime lab”) had not yet processed the rape kit performed on the victim. Appellant contends here that he did not receive all test results and documents from the crime lab until the end of September, 2005.⁵ He thus argues that the speedy-trial clock should have continued to run from the time of his arrest until his trial.

In his argument, appellant appears to erroneously believe that if a prosecutor is awaiting test results from the crime lab, the time is included in calculating the speedy-trial time limit. This conclusion is incorrect. The test results from the crime lab constituted evidence that was material to the State’s case. Pursuant to Rule 28.3(d), this time period is properly excluded and the speedy-trial time was tolled for sixty-one days during the first continuance.⁶ *See e.g. Chenowith, supra; accord Autrey v. State*, 90 Ark. App. 131, 204 S.W.3d 84 (2005).

The next two continuances spanned October 19, 2004, to February 10, 2005. Appellant contends that the prosecutor requested these additional continuances due to the crime lab’s continued failure to complete testing of the submitted evidence. As above, appellant appears to presume that this time would be attributable to the prosecutor, and the speedy-trial clock would continue to run.

However, the docket entries made by the trial court and the orders entered that granted the second and third continuances unequivocally indicated that trial counsel sought both of these continuances. A delaying act that is memorialized by a record taken at the time it occurred may satisfy the requirements of Rule 28.3. *Camargo, supra*. Therefore, based upon the language

⁵The transcript of the hearing held on February 10, 2005, indicates that appellant had been provided prior to that hearing, or would be provided shortly thereafter, the majority of the reports and documents produced by the crime lab.

⁶In order for the time to be excluded, the prosecutor must show that due diligence has been exercised to obtain such evidence and there are reasonable grounds to believe that such evidence will be available at a later date. Ark. R. Crim. P. 28.3(d)(1). The prosecutor made such a showing at the hearing.

contained in the docket sheet and orders, it is clear that this 114-day period is excluded from the calculation of the speedy-trial period as a delay that resulted from continuances requested by the defendant or defense counsel. Rule 28.3(c); *Dodson, supra*. Moreover, even assuming that the prosecutor had requested the additional continuances based upon the crime lab's delay in processing material evidence, as discussed, the time would still be excluded under Rule 28.3(d).

The next two continuances covering February 10, 2005, to May 10, 2005, are challenged by appellant as being improperly excluded from the speedy-trial time. He maintains that the crime lab information was not completed or produced by the prosecutor during this eighty-nine-day period.

The continuances need not be reviewed to determine whether the time was excludable as appellant fails to demonstrate a violation of the speedy-trial rule. As of February 10, 2005, in this time line, 175 days are properly excluded from the speedy-trial time. This number exceeds the minimum of 108 days necessary for finding that appellant had been tried within the speedy-trial limits. The same conclusion is reached even if the time for the duration of these two continuances is included in the speedy-trial calculation. Under that scenario, appellant was tried 298 days after he was arrested, and the time in which appellant was tried was within the speedy-trial limits.

The trial court did not err in finding that the first speedy-trial period ended upon mistrial or that the speedy-trial rule had not been violated. On that basis, the court also did not err in finding that counsel was not ineffective by failing to raise a speedy-trial claim in circuit court. Counsel is not ineffective for failing to make an argument that is meritless, either at trial or on appeal. *Camargo, supra*.

Affirmed.